

TITLE 327 WATER POLLUTION CONTROL BOARD

LSA Document #09-213

SUMMARY/RESPONSE TO COMMENTS FROM THE SECOND COMMENT PERIOD

IDEM requested public comment from August 11, 2010, through September 24, 2010, on draft rule language as well as comments on the potential fiscal impacts of the rule. IDEM received comments from the following parties by the comment period deadline:

Christopher Surber (CS)
Timothy and Nikka Ogborne (TNO)
Ann Miller (AM)
Harold Wilson (HW)
Rev. Marian Patience Harvey (MPH)
Livestock and Poultry Rule Revision Group (LPRRG)
Kay Whitehead, Seldom Rest Farms (KW)

Following are the comments received during the comment period and IDEM's responses thereto:

Comment: Further regulations are in order to compel CAFO operators to pre-treat waste or establish on-site waste treatment facilities to create and maintain more hygienic practices. Evidence of this need is the recent problems in Randolph County, Indiana and Grand Lake, Ohio, and the recent importation of waste from Ohio that contaminated lakes there. (CS) (TNO)

Response: IDEM intends to incorporate the federal CAFO NPDES regulations and run the program in accordance with the federal program. At this time, pre-treatment of animal manure is not part of the program and IDEM does not intend to require pre-treatment.

Comment: All animal factory rules should be strengthened to include the following:

- 1) Mandatory yearly inspections of the factories and their lagoons for toxins and pathogens, Lagoon conditions and animal conditions.
- 2) Mandatory soils testing before and after land application of manure to make certain over-application does not occur.
- 3) Mandatory bonds by the animal factory owners to cover the cost of cleaning up polluted creeks, rivers and soils resulting from mis-application or over-application of liquid manure sewage.
- 4) Minimum setbacks for these factories should be two miles from any school, hospital, nursing home, or food facility (restaurants or groceries).
- 5) No new confined feeding operations should be built until all current ones are inspected and deemed to be free of disease, toxins, and improperly stored manure.
- 6) IDEM should be empowered to enforce the rules associated with confined feeding, and provided the funding and staff needed.
- 7) Fines should be levied for operators who pollute Indiana's water and air, and provisions should be included for neighbors to recover costs associated with rule violations.
- 8) No out of state manure should be allowed to be imported into Indiana from neighboring states.
- 9) All hog manure that cannot be applied via sub-surface soil application at the correct agronomic fertilizer rates should be treated as human sewage and disposed of in the same manner.
- 10) County and state roads should not be used as staging areas for loading mega-tankers with liquid manure, and road weight limits should be established and enforced to prevent the continued degradation of rural roads.

- 11) Citizens should have an avenue for legal recourse to recover costs for health problems, medical bills, loss of use of their property, and loss of property values due to neighboring animal factories. There should be a provision for litigation to recover the costs associated with living near animal factories that currently are exempt from air, water, trespass and nuisance codes. (AM)

Response: IDEM is adopting the federal NPDES regulations for CAFOs and intends to run the program in accordance with the federal program. In addition, the construction requirements for state CFOs apply to these operations. IDEM does not have the authority to ban out of state waste. The office of the state chemist (OSC) has the statutory authority to regulate the application of fertilizers, including animal manure for both in state and imported waste. OSC is currently working on regulations for fertilizer land application.

Comment: All confined feeding operations, regardless of size, must be included in this program. (HW) (MPH)

Response: This rule is for NPDES permits for operations defined as CAFOs under the federal program. IDEM is also currently revising its rules for the state CFO program, which regulates operations with fewer animals than those covered under the federal NPDES CAFO program. All operations defined as CFOs under Indiana law are regulated under the current CFO program.

Comment: All operators should submit manure application data at least twice a year, identifying sites where manure was applied and how much was applied. (HW) (MPH)

Response: CAFOs are required to submit an annual report to the commissioner that identifies the number and type of animals under confinement; the estimated amount of manure generated; the estimated amount of manure transferred to another person by the CAFO; and the total number of acres used for land application by the CAFO in the previous twelve months. Both soil and manure testing is required under the CAFO NPDES rule as well.

Comment: No manure should be applied on acreage with a phosphorus level greater than 200 parts per million. (HW) (MPH)

Response: CAFOs will not be allowed to apply manure to acreage with phosphorus soil test levels above 200 ppm.

Comment: Application of manure on frozen, snow-covered, or saturated ground is irresponsible and must be prohibited. (HW) (MPH)

Response: Land application on snow-covered or frozen ground is prohibited for all large CAFOS as defined at 40 CFR 122.23(b) and for any CAFO with a NPDES permit.

Comment: Changing the rules to prohibit application of manure to frozen or snow covered ground will either force us to violate your new rules or shut us down. Slope and ground cover have long been considered during this time of year and the current requirements should remain in place. (KW)

Response: Land application on snow-covered or frozen ground is prohibited for all large CAFOS as defined at 40 CFR 122.23(b) and for any CAFO with a NPDES permit.

Comment: Setbacks from property lines and public roads are not sufficient. Suitable buffering boundaries must be determined with environmental professionals and people living nearby, not with the confined feeding industry. (HW) (MPH)

Response: IDEM has taken comments from and met with people of all interests, not just the confined feeding industry. IDEM believes the setbacks contained in the rules are protective of the waters of the state, which is the primary purpose of the rule.

Comment: Persons proposing to acquire ownership of confined feeding operations by transfer should be required to meet good character requirements as determined by non-industry and non-government consultants. (HW) (MPH)

Response: The good character requirements of IC 13-18-10 apply to any person who is constructing a confined feeding operation (CFO) as that term is defined in Indiana law (IC 13-11-2-40), or any person who is expanding the operation to increase either animal capacity or manure containment capacity. The statute does not provide authority for IDEM to require good character for permit transfers.

Comment: All confined animal feeding operations must provide cleanup assurances. (HW) (MPH)

Response: Presently, there are no bonding requirements for either CFOs or CAFOs in Indiana. Imposition of such assurances would require statutory authority.

Comment: Engineers must be licensed in Indiana. (HW) (MPH)

Response: For purposes of this rulemaking as well as the CFO rulemaking, any requirements that an engineer must sign off or attest to something specifically spell out that the engineer must be a registered professional engineer.

Comment: Exiting the NPDES program. The vast majority of operations which hold an NPDES permit are no longer required to do so because they do not discharge or propose to discharge. Many of those operations have either renewed their permits during the rulemaking process or have become newly permitted. Because those operations no longer need to maintain an NPDES permit but may be subject to several more years of regulation under the current permit, a process which allows them to exit the CAFO NPDES program while recognizing their previous application or renewal must be developed. It is necessary to include a provision establishing a streamlined procedure for these and other NPDES permit holders to exit the NPDES program and to maintain approval under the CFO program. Since the operations considering opting out of the NPDES program will have already undergone the permitting process and be valid permit holders, they should not have to go through another permitting process. All operations currently operating with NPDES permits are considered CFOs by Indiana Statute. Additionally, the application process for obtaining an NPDES permit, as well as the NPDES regulations, require that an operation be subject to the construction requirements of the CFO program. As such, a CAFO operator who is eligible to exit the NPDES program should have two options: retain the NPDES permit or revoke the notice of intent. If the producer elects to revoke the notice of intent, the facility should automatically enter the state CFO program. (LPRRG)

Response: IDEM agrees that a transition for those operations no longer required to maintain a NPDES permit under federal law is necessary as such operations would still fall under the state CFO program. Transition language has been added to the NPDES rule to allow for a streamlined transition into the CFO program.

Comment: General permits. We understand that EPA's stance toward Indiana's current general permitting structure necessitates the elimination of the general permit in its current form. However, we urge IDEM to consider the implementation of administratively issued general permits in the future. The general permit is useful where the operation to be permitted will adhere to a specific set of standards. In a regulatory environment where there is great uncertainty as to how EPA will administer these regulations, many producers may opt for an NPDES permit to avail themselves of that added protection.

Since the possibility exists for an influx of these types of NPDES applications in the future, Indiana should consider streamlining the permitting process by implementing an administratively issued general permit. (LPRRG)

Response: IDEM is currently transitioning the NPDES general permit program from a permit-by-rule program to a program wherein the permits are administratively issued. IDEM plans to repeal the CAFO NPDES general permit and only issue individual CAFO NPDES permits to those sources requiring or seeking a NPDES permit. In the future, if the need again arises for a general permit for CAFOs, IDEM will consider reviving the NPDES general permit for CAFOs. If that occurs, the permit will be administratively issued.

Comment: Nutrient management plans. According to the Second Circuit Court of Appeals decision in *Waterkeeper Alliance, Inc. v. U.S. Environmental Protection Agency*, 399 F.3d 486 (C.A.2 2005), nutrient management plans must be subject to notice and comment provisions. Throughout the federal NPDES permitting process, there was much concern about whether agricultural operations would be able to maintain the flexibility needed to make adjustments to nutrient management and crop decisions based upon factors beyond the control of the farmer, such as delays in planting caused by wet weather. In the federal rule, two options were provided for nutrient management planning – the linear and narrative approaches. We propose that the state NPDES rule authorize the use of programs (computer applications) such as Manure Management Planner (MMP), developed at Purdue University, as a main component for nutrient management planning. For producers who do not use MMP as part of the narrative approach, they will have to provide more information as to how the calculations for nutrient rates will be completed, as well as other components of a nutrient management plan not covered or included in MMP. Producers using this approach will still be required to provide the methodologies that they use to acquire all of the relevant nutrient data. (LPRRG)

Response: The federal rule does not prohibit the use of such programs as the Purdue program. It does, however, require the submittal of the methodologies used.

Comment: With respect to the notice and comment period for nutrient management plans, EPA has allowed for much flexibility by the states. We suggest that the rule allow for NMPs and comments to be submitted electronically. The notice and comment period for the initial submission of a NMP should coincide with the comment period for other provisions for the permit, such as construction approval. We suggest that this period should be thirty days in order to match federal requirements for the notice and comment period for an individual NPDES permit. (LPRRG)

Response: As the federal rules are being incorporated by reference, the requirements therein will apply. The NMP is initially submitted with the NPDES permit application and will be put on public notice at the time the draft permit is put on notice. However, a CAFO that requires a construction approval under State law will be required to comply with the requirements of 327 IAC 19-7. Specific language has been added to the CAFO rule to reflect this requirement.

Comment: For substantial modifications of the NMP, the notice and comment period needs to be reduced. This is because substantial modifications may result from time-sensitive issues which will require immediate action on the part of the farmer to be able to apply manure for crop needs. For substantial modifications, the time period should be seven days. We believe this is appropriate because the NMP will have already undergone one comment period and the number of changes should be few and require less time for review. For submission and notice with respect to NMPs and later substantial changes, we urge IDEM to consider the use of the internet as an appropriate method to expedite this time-sensitive process. (LPRRG)

Response: IDEM agrees that the comment period for such changes should be reduced from the standard 30 days if the NMP has already undergone public review and comment. IDEM has proposed a seven day comment period in the draft rule. The NMP changes will be posted on IDEM's web site for public review, just as draft permits are now.

Comment: Self certification. The federal CAFO NPDES rule contains a provision whereby livestock and poultry operations can self certify that they do not discharge or propose to discharge. This process should be simple and straightforward so that producers are able to achieve the added protection of the self certification. We believe that much if not all of what the certification is to accomplish can be shown by participation in the CFO approval program. Nonetheless, it is imperative that IDEM coordinate with EPA to satisfy any questions that exist with respect to the information needed and requirements to be met for completion of a valid self certification. (LPRRG)

Response: This particular portion of the federal CAFO NPDES rules has been struck down in a recent decision by the Fifth Circuit Court of Appeals [*National Pork Producers, et al. v. United States Environmental Protection Agency No. 08-61093 (5th Cir. 2011)*]. The current state of the federal law is that a NPDES permit is only required for a CAFO that is actually discharging. Because the "propose to discharge" language has been struck down, there is no need to include the self-certification language in the rule. That portion of the federal rules is not being incorporated into the rule.

Comment: The guidance for implementation of this rule should be developed with public input and comment so that the guidance is clear and producers who have CAFO NPDES permits will understand what is required of them to comply with the law. (LPRRG)

Response: IDEM will revise existing guidance as necessary. However, as this is essentially a federal rule, IDEM will not be developing guidance that contravenes existing federal rules or conflicts with federal guidance.

Comment: The requirement to maintain farm records at the farm is working well and there is no reason to change. Our records are open to inspection by IDEM at any time. (KW)

Response: This rule incorporates updated federal requirements for all CAFO NPDES permit holders. Certain records are maintained on-site and other records, such as the annual report, are required to be submitted to IDEM.

Comment: The acreage requirement for land application should be tied directly to the nutrient acres needed. (KW)

Response: IDEM agrees.

Comment: Mortality management is currently regulated by the Indiana Bureau of Animal Health and it should remain regulated by that agency. (KW)

Response: The references to management of mortalities in this rule relate directly to protection of water quality. Requiring that mortalities be handled in such a way as to prevent a discharge of pollutants to Indiana's waters is entirely appropriate in this rule.